Supreme Court, U.S.
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No. 99-474

In the Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G–22M—which was undisputably enacted to condemn the Union of Myanmar and to influence the conduct of its government—unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation. WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this Court in cases where the conduct of foreign affairs or where foreign affairs considerations figured prominently. *See, e.g., Perpich* v. *U.S. Dep't of Defense*, 496 U.S. 334 (1990). WLF submits this brief in support of Respondent and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

The Massachusetts Burma Law unconstitutionally trenches on the federal government's predominant authority over this Nation's foreign affairs. Contrary to the Commonwealth's arguments, this Court can and should squarely address that claim.

The Constitution establishes a structure, a framework of government, that renders the question of congressional consent irrelevant. Congress cannot consent to State laws that encroach on its constitutionally delegated powers any more than States may consent to laws that encroach on their constitutionally reserved powers. Moreover, it has long been understood that the framework of government established by the Constitution enjoys two protections. Congress may affirmatively enact laws that preempt conflicting State laws, and this Court may, in the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

sound exercise of judicial review, determine that a State or federal law transgresses the boundaries laid down by the Constitution. For these reasons, the Court must squarely address whether the Massachusetts Burma Law unlawfully exercises the federal government's authority over foreign affairs. The answer is, it does.

The Constitution delegates predominant authority over foreign affairs to the federal government, as text, evidence of original understanding, and this Court's decisions attest. Although States may exercise their reserved powers in a manner that happens to create an effect abroad, they may not conduct foreign affairs. To distinguish between these two circumstances, we propose a series of questions aimed at identifying when a State has conducted foreign affairs. Tested by that inquiry, the Massachusetts Burma Law qualifies as an instrument of foreign affairs. Because it does, this Court should declare the law unconstitutional.

ARGUMENT

The U.S. Court of Appeals for the First Circuit held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G–22M and 40F½, "interferes with the foreign affairs power of the federal government and is thus unconstitutional." *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999). Massachusetts has asked this Court to reverse that decision based on at least three reasons. First, it argues that State procurement laws fall within the State's broad authority "'to determine those with whom it will deal,'" Br. Pet. 27 (quoting *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940)), "'free[] from federal constraints.'" *Id.* (quoting *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980). Second, Massachusetts argues

that "Congress has implicitly permitted state and local selective purchasing laws on Burma." *Id.* at 21. Third, it urges this Court to eschew judicial review on the ground that policing "constitutional claims against divestment and selective purchasing laws . . . will sap the lawmaking powers of the States and unduly enlarge the role of the courts." *Id.* at 46. We disagree. To explain why, we begin by covering familiar ground: the chief structural features of the Constitution.

I. CONGRESS MAY NOT CONSENT TO STATE ENCROACHMENTS ON ITS CONSTITUTIONALLY DELEGATED POWERS

James Madison described our form of government with brilliant brevity. "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments." THE FEDERALIST NO. 51, at 351 (Jacob E. Cooke ed., 1961). Moreover, Madison assured the American people that the federal government would remain limited, both because its powers are enumerated and because those powers are few in number and readily distinguishable from the powers reserved to the States.

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend

> to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 313. Counterbalancing the limits placed on the federal government is the Supremacy Clause, which ensures that "[t]he general government, though limited as to its objects, is supreme with respect to those objects." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821).

Massachusetts has asserted that the Burma Law ought to be regarded as constitutional, simply because Congress has not expressly preempted it and instead has "implicitly permitted state and local selective purchasing laws on Burma." Br. Pet. 21. That assertion flies in the face of this Court's teaching that the form of government created by the Constitution is independent of political arrangements between Congress and the States. In *New York* v. *United States*, 505 U.S. 144 (1992), the Court addressed a Tenth Amendment challenge to the take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, *codified at* U.S.C. §§ 2021b *et seq.* This provision required States to enact legislation in a manner dictated by Congress or "tak[e] title to and possession of the low level radioactive waste generated within their borders and becom[e] liable for all damages waste generators suffer as a result of the States' failure to do so promptly." *Id.* at 174–75. The United States argued that the provision "embodies . . . a compromise to which New York was a willing participant, and from which New York has reaped much benefit." 505 U.S. at 181. It then posed the following question: "how can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?" *Id.*

For its answer the Court returned to first principles:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

Id. Because it understood that the federal structure stands on a solid foundation of popular sovereignty, the Court understandably concluded that the States' consent to the take title provision was constitutionally irrelevant. "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.* at 182.

The Court drew support for this conclusion from two sources. It first relied on its separation of powers decisions, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *INS* v. *Chadha*, 462 U.S. 919 (1983), which held that "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." 505 U.S. at 182. The Court also pointed out that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *Id.* In *New York* those incentives gave both state and federal officials every *political* reason to avoid becoming accountable for the unpopular decision of where to place radioactive waste disposal sites. Because the "[t]he interests of public officials thus may not coincide with the Constitution's intergovernmental allocation

of authority . . . federalism is hardly being advanced." *Id.* at 183.

Massachusetts has asked this Court a question that mirrors the question addressed in *New York*. In effect, it asks how a state statute can be found an unconstitutional infringement of federal authority when Congress consented to the statute's enactment. *See* Br. Pet. 21. However, *New York* teaches that the Constitution establishes a permanent structure of government, not a transient set of political arrangements. And that structure is no less undermined when States exercise powers delegated to the federal government than when the federal government exercises powers reserved to the States. *See Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). For that reason, congressional consent, express or implied, has no bearing on the constitutional question of whether the Massachusetts Burma Law usurps the national government's predominant authority over foreign affairs.

II. JUDICIAL REVIEW IS ENTIRELY APPROPRIATE TO RESOLVE QUESTIONS ARISING FROM THE CONSTITUTIONAL DISTRIBUTION OF FEDERAL AND STATE POWERS

Massachusetts has also asserted that the Court ought to avoid casting itself in the role of "'overseer of our government,'" Pet. 46 (quoting *Barclays Bank* v. *Franchise Tax Bd.*, 512 U.S. 298, 330 (1994)), by refusing to open the door to "constitutional claims against divestment and selective purchasing laws." *Id.* It is unclear exactly what Massachusetts means by this. Perhaps it means that the Court should avoid deciding whether the Burma Law infringes on the federal government's foreign affairs power, simply

because it involves the topic of foreign affairs. If so, the Court has already rejected this argument, emphasizing that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, 369 U.S. 186 (1962); *see also Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U.S. 221, 229–30 (1986). To distinguish political questions from questions fit for judicial resolution, the Court has looked beyond the subject matter to "the history of its management by the political branches," 369 U.S. at 211, "its susceptibility to judicial handling in the light of its nature and posture in the specific case," *id.*, and "the possible consequences of judicial action." *Id.* at 211–12. For example, the Court explained that while it would avoid asking whether a treaty has been terminated, it would confidently address whether a treaty preempts an allegedly conflicting State law. *Id.* at 212.

On these terms the question before the Court presents no bona fide political question at all. Massachusetts has simply confused the term "political question" with what is undoubtedly "a question having political overtones." Far from calling on the Court to evaluate the merits of a foreign policy matter, this case demonstrates that it is possible to address the question presented without inquiring into the political conditions of Myanmar. *See National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999). To answer the question before it, this Court need only do what it has done from the very beginning: "the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled." *See McCulloch* v. *Maryland*, 17 U.S. 316, 405 (1819).

Perhaps Massachusetts's argument is that the Court should avoid deciding questions centering on the constitutional distribution of powers to the federal government and the States. If so, the Commonwealth is gravely mistaken. Disputes regarding the distribution of power between the federal government and the States form an especially appropriate object for the exercise of judicial review. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997). Certainly that was the view of the Court in *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858). There the Wisconsin Supreme Court, on a petition for habeas corpus, freed a prisoner charged by a federal commissioner with violating the Fugitive Slave Act and declared the Act unconstitutional. Then the court ordered the man released again after he was convicted in federal court. *Id.* at 507–09. This Court held that State courts lack the power to determine the validity of a federal order committing a person to prison. *Id.* at 523. Chief Justice Taney, writing for a unanimous Court, took pains to emphasize the importance of judicial review for the preservation of the constitutional structure. In describing the reasons for the delegation of powers to federal courts under Article III, Justice Taney wrote, "This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."[2] *Id.* at 520.

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[2] Daniel Webster, speaking during the great Webster-Hayne debates, expressed much the same thought:

> No State law is to be valid, which comes in conflict with the Constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the

(continued...)

For these reasons, the Court should decline Massachusetts's invitation to eschew the exercise of judicial review. *See* Br. Pet. 46. Instead the Court should straightforwardly address whether the Massachusetts Burma Law usurps the federal government's constitutional authority over foreign affairs. We urge the Court to conclude that it does. Constitutional text, history, and this Court's decisional law demonstrate that the federal government holds predominant authority over foreign affairs.

III. THE CONSTITUTION DELEGATES PREDOMINANT AUTHORITY OVER FOREIGN AFFAIRS TO THE FEDERAL GOVERNMENT

A. Text

The words of the Constitution delegate vast powers over foreign affairs to the federal government. Congress holds the power to establish tariffs, U.S. CONST. art. I, § 8, cl. 1, "provide for the common Defence," *id.*, regulate foreign commerce, *id.* at art. I, § 8, cl. 3, regulate naturalization, *id.* at art. I, § 8, cl. 4, regulate the value of foreign currency, *id.* at

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[2] (...continued)

> Constitution itself decides also by declaring "that the judicial power shall extend to all cases arising under the Constitution and laws of the United States." These two provisions, sir, [the Supremacy Clause and Article III, § 2] cover the whole ground. They are in truth the keystone of the arch. With these it is a Constitution; without them it is a Confederacy.

Daniel Webster, Reply to Hayne, Jan. 26th, 1830, *reprinted in* 10 THE WORLD'S BEST ORATIONS 3820 (David J. Brewer ed., 1899). Tocqueville agreed, describing this Court as "a unique tribunal one of whose prerogatives was to maintain the division of powers appointed by the Constitution between these rival governments." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 115 (J.P. Mayer ed. & George P. Lawrence trans., 1969).

art. I, § 8, cl. 5, punish naval crimes and violations of international law, *id.* at art. I, § 8, cl. 10, "declare war," *id.* at art. I, § 8, cl. 11, raise and regulate armies and navies, *id.* at art. I, § 8, cls. 12–14, organize and fund the militia, *id.* at art. I, § 8, cls. 15–16, and govern lands purchased for the building of military bases. *Id.* at art. I, § 8, cl. 17. Article II delegates equally impressive authority over foreign affairs to the President, including the power to serve as "Commander in Chief," *id.* at art. II, § 2, make treaties and appoint diplomats, *id.*, receive diplomats and foreign ministers, *id.* at art. II, § 3, and commission military officers. *Id.* Article III delegates to federal courts jurisdiction over cases arising under treaties, *id.* at art. III, § 2, cases affecting foreign diplomats and ministers, *id.*, admiralty and maritime cases, *id.*, and cases between an American citizen and a foreign country or its citizens. *Id.* In addition, occupying most of this Court's original jurisdiction are "cases affecting ambassadors, other public ministers and consuls." *Id.*

As clearly as it delegates this array of powers to the federal government, the Constitution with equal clarity prohibits States from encroaching on many of these powers. Article I, section 10 forbids States to "grant Letters of Marque and Reprisal." *Id.* at art. I, § 10, cl. 1. It also forbids them to do the following without the consent of Congress: "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws," *id.* at art. I, § 10, cl. 2, "lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* at art. I, § 10, cl. 3.

The text of the Constitution thus confirms that the federal government possesses vast powers to wage war and conclude peace, regulate foreign commerce, adjudicate disputes affecting foreign ministers, and in several other ways to govern the course of the Nation in its relationship to the world. Yet the text alone does not resolve the question presented, because it contains no single clause defining the term "foreign affairs" or "foreign relations."

However, "a fair construction of the whole instrument," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), discloses that the Constitution delegates predominant power over foreign affairs to the federal government. "[A]gainst the landscape of foreign relations as they were conducted at the time of the Founding, the allocation seems decisively to have established a principle of federal exclusivity. War, trade, treaties, and the maintenance of diplomatic relations—arguably the foreign relations of the Founding era consisted of nothing else." Peter J. Spiro, *Role of The States in Foreign Affairs: Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1228–29 (1999). In addition, the lack of a precise constitutional definition of foreign affairs should not be considered a barrier to recognizing foreign affairs as a bona fide category of constitutional interpretation. "Behind the words of the constitutional provisions are postulates which limit and control." *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 322 (1934). It is likewise true that the Constitution nowhere contains the terms "separation of powers," or "federalism," or even "the rule of law," yet like "foreign affairs" they number among the "essential postulates," *id.*, of that document. *See, e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (separation of powers); *Gregory* v. *Ashcroft*, 501 U.S. 452, 457-59 (1991) (federalism); *In re Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting) (the rule of law).

This interpretation of constitutional text is amply supported by evidence of original understanding.

B. Original Understanding

It is a commonplace that defects in the Articles of Confederation led to the forming of "a more perfect Union," U.S. CONST. preamble, under the Constitution. But nowhere is this commonplace more true (or more revealing) than in the field of foreign affairs. "Of all the impulses that drove men like Washington and Hamilton to Philadelphia in 1787, none was stronger than the uncomplicated, patriotic sense of shame at the contempt in which the United States seemed to be held—from Britain at one end of the scale of power to the Barbary states at the other." CLINTON ROSSITER, 1787: THE GRAND CONVENTION 45 (Norton ed., 1987) (1966). Three foreign policy crises had especially profound effects.

The first arose out of the Peace of 1783, which concluded the War of Independence with Great Britain. It entitled both American and British creditors to recover good faith debts "with no lawful impediment," JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 27 (1996), and required Congress to get the states to allow British subjects and American loyalists to recover their confiscated property. *See id.* "Both articles placed Congress in the awkward position of guaranteeing what it lacked the constitutional authority to deliver: the compliance of state legislatures and courts with a national commitment made to a foreign power." *Id.* The British retaliated by keeping their forts in Oswego, Niagra, and Detroit, along the northwestern frontier, in violation of the peace treaty. *See id.*

By 1784, a second crisis erupted when Great Britain closed her home island and West Indies ports

to American shipping. At the same time, British ships entered American ports at will. *See id.* "Lacking authority to regulate interstate or foreign commerce, Congress could neither devise nor impose a uniform set of restrictions on British ships. And this *constitutional* debility in turn diminished the prospects for advancing American trading interests through the negotiation of a satisfactory commercial treaty with Britain . . . ." *Id.* at 26-27.

The third major foreign policy crisis arose when, in April 1784, Spain barred American ships from entering New Orleans and navigating the lower Mississippi River. *See id.* at 27. Because there was effectively no American navy to counter Spain's action, American frontiersmen were cut off from exporting their goods via the Gulf of Mexico. *See id.* This posed a grave threat to the safety of America's western territories. As events then stood, "[s]hould the weakness of the Union force western settlers to accommodate themselves to Spain, control of the regions lying between the Appalachian Mountains and the Mississippi would be lost to the United States." *Id.*

With foreign affairs disasters like these in mind, "the most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies." *Id.* at 26. Yet the reasons why the Articles left the Nation *constitutionally* unable to conduct foreign affairs are far from evident on reading the Articles of Confederation themselves. After all, Article IX granted congress "the sole and exclusive right and power," THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 376, 380 (Donald S. Lutz ed., 1998), over nearly the same range of matters ultimately delegated by the Constitution to the federal govern-

ment, including "determining on peace and war," *id.*, "sending and receiving ambassadors," and "entering into treaties and alliances." *Id.* At the same time, Article VI prohibited the States from, among other things, sending and receiving ambassadors, entering treaties or other international agreements, or engaging in war without congressional consent. *See id.* at 378–79.

For an answer to this puzzle we are indebted to James Madison. As a recent biographer has written, "the Virginian's first and most important contribution to the framing . . . lay in his conclusion that the fundamental flaw of the Confederation was its irredeemably defective structure." LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC 116 (1995). Based on an extensive study of ancient and modern confederacies, Madison identified "[e]ncroachments by the States on the federal authority," James Madison, *Vices of the Political System of the United States*, *reprinted in* JAMES MADISON, WRITINGS 69 (Jack N. Rakove ed., 1999), as a key defect of the Articles. As examples of this vice he cited Georgia's war against the Indians, "unlicensed compacts," *id.*, between Virginia and Maryland and Pennsylvania and New Jersey, and the military troops raised and kept by Massachusetts. (Interestingly, two out of three examples reflected encroachments by the States on the Continental Congress's "sole and exclusive," THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 376, 380 (Donald S. Lutz ed., 1998), power over foreign affairs.) As alarming as these events were in themselves, Madison worried more that they disclosed a deep flaw in the constitutional foundation of the Articles. "[R]epetitions may be foreseen in almost every case where any favorite object of a State shall present

a temptation." *Id.* "The inadequacy of this governmental structure was responsible in part for the Constitutional Convention." *New York* v. *United States*, 505 U.S.144, 163 (1992). Thus the crucial point is not so much that America suffered from foreign policy crises under the Articles of Confederation, as it is that those crises prompted the Founders to adopt a new form of government in response. And this close relationship between enhancing the foreign affairs powers of the federal government and guarding against encroachments on that power by the States deeply influenced those who wrote and ratified the Constitution.

On May 29, 1787, Governor Edmund Randolph of Virginia stood in Independence Hall and introduced the Virginia Plan, the basis for the original Constitution. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18–19 (Max Farrand ed., 1966). Among "the defects of the confederation," *id.* at 18, he described, two involved the Nation's conduct of foreign affairs. First, Randolph noted that "the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority. . . . [T]hey could not cause infractions of treaties or of the law of nations, to be punished . . . . [P]articular states might by their conduct provoke war without controul." Second, Randolph observed "that there were many advantages, which the U. S. might acquire, which were not attainable under the confederation—such as . . . counteraction of the commercial regulations of other nations." *Id.* at 19.

Three weeks later, on June 19th, Madison addressed the Convention in opposition to the Virginia Plan's great rival, the New Jersey Plan, which proposed a weaker, more state-centered form of government. *See id.* at 314–22. Madison criticized

that Plan on two pertinent grounds. First, he pointed out that it would not "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars." *Id.* at 316. For, as Madison underscored, "A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." *Id.* Second, he discerned that the Plan would not "prevent encroachments on the federal authority," *id.*, because it "omitt[ed] a controul over the States as a general defence of the federal prerogatives." *Id.* at 317. Given this and other criticisms, the New Jersey Plan was rejected. *Id.* at 322.

But the Convention also declined to adopt Madison's solution to the problem of State encroachments on federal powers. It flatly rejected the Virginia Plan's proposal giving Congress authority "to negative all laws passed by the several States, contravening in the opinion of the national Legislature the articles of Union." 1 *Id.* at 21. Gouverneur Morris convincingly argued, "A law that ought to be negatived will be set aside in the Judiciary departmt. And if that security should fail; may be repealed by a Nationl. Law." 2 *Id.* at 28. Moments later, in place of Madison's beloved negative on state laws, the Convention adopted the principle of the supremacy of federal law, *see id.* at 28-29, which eventually became embodied in the Supremacy Clause. *Compare id. with* U.S. CONST. art. VI.

The finished document reflected two clear improvements over the Articles of Confederation. First, it delegated sufficient powers to the federal government to effectively conduct the Nation's foreign affairs without relying on the States. Second, it established two defenses against the encroachment

by States on federal power. As Gouverneur Morris had presciently understood, these took the form of two provisions. One was the Supremacy Clause, which implicitly gave Congress the power to affirmatively deny States the authority to act on a matter delegated to the federal government. The other lay in the grant of jurisdiction to federal courts, which carried with it the power to "set aside" State laws at odds with the Constitution itself. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 391 (1819). As Daniel Webster succinctly expressed it, "These two provisions . . . cover the whole ground. They are in truth the keystone of the arch. With these it is a Constitution; without them it is a Confederacy." Daniel Webster, Reply to Hayne, Jan. 26th, 1830, *reprinted in* 10 THE WORLD'S BEST ORATIONS 3820 (David J. Brewer ed., 1899).

The Constitution also boosted the national government's power to control foreign affairs. *The Federalist*, "usually regarded as indicative of the original understanding of the Constitution," *Printz* v. *United States*, 521 U.S. 898, (1997), makes it clear that the Constitution delegates predominant authority over foreign affairs to the federal government. Beginning in *The Federalist* No. 41, Madison analyzed the powers delegated to the federal government, explaining "the sum or quantity of power which [the Constitution] vests in the Government, including the restraints imposed on the States." THE FEDERALIST NO. 41, at 268 (Jacob E. Cooke ed., 1961) (James Madison). He classified delegations of federal power into six categories, only two of which concern us here.

The first Madison labeled "security against foreign danger," under which he included the powers of "declaring war, and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money."

Id. at 269. These he regarded as indispensable powers for a national government. "Security against foreign danger is . . . an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the fœderal councils." *Id.*

Madison then discussed the second category of federal powers, "which regulate the intercourse with foreign nations." THE FEDERALIST NO. 42, at 279. Under this heading, Madison included the power "to make treaties; to send and receive Ambassadors, other public Ministers and Consuls; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to regulate foreign commerce . . . ." *Id.* Once again, Madison considered these powers to lie within the exclusive province of the federal government. "This class of powers forms an obvious and essential branch of the fœderal administration. *If we are to be one nation in any respect, it clearly ought to be in respect to other nations.*" *Id.* (emphasis added). Granting the federal government sole authority to define "offences against the law of nations," *id.*, plainly improved on the Articles of Confederation, which, as Madison pointed out, "leave it in the power of any indiscreet member to embroil the confederacy with foreign nations." *Id.* at 280-81.

Madison then distinguished the powers belonging to the federal government from those belonging to the States. State power, he wrote, would "extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 313. Federal power, on the other hand, would operate "principally on external objects, as war, peace, negociation, and foreign commerce." *Id.* Thus it

is clear that Madison regarded "war, peace, negociation, and foreign commerce" as "external objects," *id.*, over which the Constitution delegated predominant (if not exclusive) authority to the federal government.[3]

C. Precedent

This original understanding was confirmed by an unbroken line of this Court's decisions, establishing

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[3] Authoritative nineteenth century students of the Constitution agreed that the document left foreign affairs predominantly in the hands of the federal government. Alongside the *Federalist*, perhaps "the most widely held 'original understanding' of the nature of the Constitution" was expressed by Justice Joseph Story in his *Commentaries*. Ronald D. Rotunda & John E. Nowak, *Introduction* to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES at xxi (Carolina Academic Press 1987) (abridged ed., 1833) [*hereinafter* Story]. Story agreed with Madison that the Constitution reserved to the States no power to conduct foreign affairs.

> The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state. The constitution has wisely both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations, which relate to foreign powers; and an immediate responsibility to the nation on the part of those, for whose conduct the nation is itself responsible.

Id. at 490. Tocqueville agreed, writing that "the federal Constitution put the permanent control of the nation's foreign interests in the hands of the President and the Senate." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 226 (J.P. Mayer ed. & George P. Lawrence trans., 1969). Thomas Cooley, whose work decisively shaped constitutional jurisprudence during the last half of the nineteenth century, wrote that "all international questions belong to the national government." THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 128 (1868). Even the arch states' rights advocate, John Calhoun, recognized the predominance of the federal government in the field of foreign affairs. "In our relation to the rest of the world . . . the States disappear. Divided within, we present the exterior of undivided sovereignty." 29 ANNALS OF CONGRESS 531 (1816).

the principle that the federal government holds predominant authority over the entire field of foreign affairs and that this predominance necessarily denies States such authority except on the margins. *See Hines* v. *Davidowitz*, 312 U.S. 52, 62 (1941). As early as *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) the Court made it clear that in matters regarding war and peace "we are one people." *Id.* at 413. In *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540 (1840), the Court addressed whether a state could constitutionally extradite a fugitive from a foreign country. In a separate opinion, Justice Taney declared his belief that the foreign affairs power resides exclusively in the federal government: "It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . ." *Id.* at 575.

In the watershed *Chinese Exclusion Case*, 130 U.S. 581 (1889), Justice Field, writing for a unanimous Court, sustained the validity of a federal statute barring Chinese workers from entering the country. *Id.* at 606–07. A key portion of the Court's analysis revolved around the distribution of foreign affairs power under the Constitution.

> While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

Id. at 604.

More recently, the Court reiterated the principle of federal exclusivity in *United States* v. *Belmont*,

301 U.S. 324 (1937). "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government." *Id.* at 330. Based on this principle of federal exclusivity the Court struck down other State laws. *See Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *United States* v. *Pink*, 315 U.S. 203, 232 (1942).

This long line of decisions culminated in 1968, when the Court struck down an Oregon statute that established conditions under which non-resident aliens could take property through probate. *Zschernig* v. *Miller*, 389 U.S. 429, 430–31 (1968). The Court held that the law was an unconstitutional "intrusion by the State into the field of foreign affairs." *Id.* at 432. To arrive at this conclusion the Court reasoned that "state involvement in foreign affairs and international relations," *id.* at 436, was impermissible because they are "matters which the Constitution entrusts solely to the Federal Government." *Id.* The Court perceived, as the Founders did, "the dangers which are involved if each State . . . is permitted to establish its own foreign policy." *Id.* at 441. It also recognized that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

IV. STATES CROSS THE FORBIDDEN LINE SEPARATING THE LEGITIMATE FROM THE UNCONSTITUTIONAL WHEN THEY CONDUCT FOREIGN AFFAIRS

While repeatedly affirming the federal government's authority over foreign affairs in the strongest

terms, this Court has nonetheless avoided rigidly excluding States from carrying out their reserved powers when doing so happens to create international controversy. In *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court held that the foreign affairs power of the Constitution posed no bar to a California law that escheated the personal property of German citizens because Germany did not then grant American citizens the reciprocal right to inherit receive property. *Id.* at 516. The German heirs unsuccessfully asserted that the law violated the Constitution because it "seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance," a bargain that the Germans argued was "a matter for settlement by the Federal Government on a nation-wide basis." *Id.* at 516–17.

Relying on its holding in *Blythe* v. *Hinckley*, 180 U.S. 333 (1901), the Court rejected this argument as "far fetched." 331 U.S. at 517. Its reasons for doing so are significant. The Court first recited the principle that State law determines rights of succession unless preempted by treaty or federal statute. *See id.* Next the Court observed that "here there is no treaty governing the rights of succession to the personal property." *Id.* And it noted that California had not "entered the forbidden domain of negotiating with a foreign country . . . or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution." *Id.* Then the Court arrived at its famous conclusion: "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." *Id.*

The question bequeathed by *Clark* is this: where is "the forbidden line" separating valid from invalid exercises of State power? What features mark a State act as one that usurps the federal foreign affairs

power? To one side of the line stands what a lower court has called "the actual conduct of foreign affairs." *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990). On the other side lies "the great mass of local matters," *Chinese Exclusion Case*, 130 U.S. 581, 604 (1889), over which the Constitution generally reserves local control. The Court's opinions in *Clark* and *Zschernig* supply helpful hints, if not a precise mode of analysis, for marking out the boundary between them.

Relying on an implicit distinction between direct and indirect effects, the Court in *Clark* found that "[w]hat California has done will have some incidental or indirect effect in foreign countries." 331 U.S. at 517. Nonetheless, the Court refused to upend the law for that reason alone. In the Court's view, the law's "incidental or indirect effect" put it in the same league with "many state laws which none would claim cross the forbidden line." *Id.*

The majority opinion in *Zschernig* used the same distinction between direct and indirect effects to explain why the Oregon law did not survive judicial scrutiny, while the law in *Clark* passed muster. The Court explained that the Oregon law would have "more than 'some incidental or indirect effect in foreign countries.'" 389 U.S. at 434 (quoting *Clark*, 331 U.S. at 517). Because the Oregon law required courts to "launch[] inquiries into the type of governments that obtain in particular foreign nations," 389 U.S. at 434, the Court found that the law had "a great potential for disruption or embarrassment." *Id.* at 435. It found that such judicial inquiry into the political conditions of foreign countries "affects international relations in a persistent and subtle way." *Id.* at 440. Because the law had such effects, the Court concluded that it "has a direct impact on foreign relations and may well adversely affect the power

of the central government to deal with those problems." *Id.* at 441.

Justice Stewart's concurring opinion shed further light on how to identify when a State has crossed "the forbidden line." He pinpointed the law's fatal defect in the fact that it "would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments." *Id.* While Justice Stewart acknowledged the unremarkable necessity of the application of foreign law by State courts, he observed that "here the courts of Oregon are thrust into these inquiries only because the Oregon Legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves." *Id.* By doing so, he concluded, the law "launch[es] the State upon a prohibited voyage into a domain of exclusively federal competence." *Id.*

In *Clark* and *Zschernig* members of the Court primarily relied on the distinction between direct and indirect effects to identify "the forbidden line" distinguishing valid from invalid State laws. The difficulty with this distinction is that it is incomplete. Nothing in the Court's opinions explains exactly why one effect is indirect and another direct. In fact, the distinction standing by itself does not really explain why the decisions came out differently from each other. Moreover, given the Court's unsuccessful experiment with the same distinction in cases under the Commerce Clause, *see Wickard* v. *Filburn*, 317 U.S. 111, 120–25 (1942); G. Edward White, The *"Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 901 (1997), it does not hold great promise as a tool with explanatory power. But other courts have also addressed the problem of how to identify when a State has impermissibly ventured

into the field of foreign affairs, and their reasoning is helpful in elaborating a more complete and precise analysis.

In its decision holding that the Massachusetts Burma Law "interferes with the foreign affairs power of the federal government and is thus unconstitutional," *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), the First Circuit identified five reasons for concluding that the Massachusetts Burma Law "has more than an incidental or indirect effect on foreign relations." *Id.* These reasons include the following:

> (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries, ASEAN, and the European Union; and (5) Massachusetts has chosen a course divergent in at least five ways from the federal law, thus raising the prospect of embarrassment for the country.

Id.

Note that the factors revolve around two analytical categories, purpose and effect. Factor 1 goes to whether the law has the purpose of conducting foreign affairs. Factors 2 through 5 go to whether the law has had the effect of conducting foreign affairs. In relying solely on questions of purpose and effect the First Circuit was traveling a well-worn path. Other courts addressing whether a State or local law

unconstitutionally exercises the federal government's power over foreign affairs have also relied on an analysis combining purpose and effect in some manner. *See, e.g., Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990); *Horman* v. *California*, 485 P.2d 785, 797-98 (Cal. 1971).

One danger lies in the possibility that reviewing a State statute for prohibited foreign effects will invite federal oversight in cases, like *Clark*, which do not warrant it. To minimize that possibility, we recommend giving greater weight to the purpose inquiry. At the same time, to avoid the problems of subjective intent, legislative purpose should be gauged by reasonably objective standards. International effects would then form a less weighty but supplemental means of determining when a State has strayed into "the actual conduct of foreign affairs." *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990). Based on the considerations that have guided other courts, the following questions are intended to assist the Court in determining when a State has exercised the foreign affairs power belonging to the federal government:

1. Does the law single out a particular foreign country (or countries)?

2. Does the law, either on its face or in its legislative history, contain substantial evidence that its purpose is to condemn or punish the target country (or countries)?

3. Has the target country, or have other foreign countries, retaliated or formally protested to the United States, or an international organization, and cited the law as justification?

These questions have been ranked in order of importance. That is, the more indispensable the factor is for distinguishing ordinary exercises of State power from impermissible forays into foreign affairs, the

earlier it appears. Applying these tests to the Massachusetts Burma Law, it becomes clear that the law strays well over "the forbidden line" and exercises the federal government's power over foreign affairs.

V. THE MASSACHUSETTS BURMA LAW UNCONSTITUTIONALLY ENCROACHES ON THE FEDERAL GOVERNMENT'S PREDOMINANT AUTHORITY OVER FOREIGN AFFAIRS

Under the Massachusetts Burma Law, every prospective contractor must provide a statement, under penalty of perjury, describing the nature and extent of its business ties with Myanmar. *See* Mass. Gen. Laws ch. 7,§ 22(H)(c). Except in a few narrowly defined circumstances, *see id.* at §§ 22(H)(b),(d), a company doing business with or in Myanmar may not provide goods or services to Massachusetts, and any contract in violation of the statute is void. *See id.* at § 22L. The law thus blacklists and then boycotts any company doing business with or in the Union of Myanmar, forcing companies to choose between doing business with Myanmar and doing business with Massachusetts. For four reasons the law crosses "the forbidden line."

First, the law singles out Myanmar on the face of the statute. In fact, the official name of the statute is "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." *See* 1996 Mass. Acts 239.

Second, the law has the manifest purpose of condemning and punishing Myanmar. The legislative record contains statements by Representative Byron Rushing to this effect. He stated that the law set up a selective purchasing scheme because "if you're going to engage in foreign policy, you have to be very specific." *NFTC* v. *Natsios*, 181 F.3d 38, 46 (1st

Cir. 1999). More plainly still, he declared that the "identifiable goal" of the law was "free democratic elections in Burma." *Id.* At the signing ceremony, Lieutenant Governor Cellucci remarked of trade between Myanmar and the United States, "[t]oday is the day we call their bluff." *Id.* And Governor Weld himself, later commented that "it is my hope that other states and Congress will follow our example, and make a stand for the cause of freedom and democracy around the world." *Id.* Such blatant statements mark the Massachusetts Burma Law as a purposeful exercise in foreign affairs.

But even if no Commonwealth official had uttered a peep, the law as written unequivocally discloses the purpose of punishing Myanmar. The law comprises two key features: a blacklisting process and a secondary boycott.[4] "The law requires the Secretary of Administration and Finance to maintain a 'restricted purchase list' of all firms engaged in business with Burma." *Id.* at 45 (quoting Mass. Gen. Laws. ch. 7, § 22J). Once a company gets on that list, the law severely restricts that company's ability to do business with Massachusetts. *See* Mass. Gen. Laws ch. 7, § 22L. As a secondary boycott, extending beyond the targeted country to all companies doing business with the targeted country, the law undoubtedly punishes Myanmar by drawing away not only the $2 billion per year in purchasing power over which it has direct control, *see* 181 F.3d at 46, but also the purchasing power of every company who has chosen to do business with Massachusetts rather than Myanmar—companies whose annual revenue exceeds $246 billion. J.A. 219. Presenting companies with the choice of doing business with Myanmar or Massachusetts is the law's central purpose, as is true of any secondary boycott. Hannes L. Schloemann and Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO*, 93 AM. J. INT'L. L. 424, 428 (1999). Seen from this vantage point, it is a powerful "alternative to war." Br. Pet. 29.

Third, the law has attracted formal diplomatic protests from this Nation's major trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations (ASEAN). *See* 181 F.3d at 47.

By every one of these measures the Massachusetts Burma Law is no mere "diplomatic bagatelle," *Zschernig* v. *Miller*, 389 U.S. 429, 435 (1968). It uses the Commonwealth's procurement authority to impose a secondary boycott on a foreign country, thus reflecting a deliberate attempt to employ its economic muscle in the service of foreign affairs goals. No matter how enlightened or admirable these goals may be, the Constitution delegates the predominant authority over foreign affairs to the federal government—not to the States.

[4] A secondary boycott, in the context of foreign affairs, is defined in the following terms:

> In a secondary boycott, state A says that if X, a national of state C, trades with state B, X may not trade with or invest in A. In other words, X is required to make a choice between doing business with or in A, the boycotting state, and doing business with or in B, the target state, although under the law of C where X is established, trade with both A and C is permitted.

Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L. L. 419, 429–30 (1996). Such boycotts attract heavy criticism, even when enacted by Congress. *See id.* at 433–34.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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